SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 3 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-21

JAMES HEARD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HOWARD T. SAVAGE
Suite 1015
100 N. LaSalle Street
Chicago, Illinois 60602
Telephone: (312) STate 2-2131
Attorney for Petitioner

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-3988

INDEX

PAGE

REFERENCE TO OPINION BELOW 2

JURISDICTIONAL STATEMENT 2

QUESTIONS PRESENTED 3

CONSTITUTIONAL PROVISIONS AND STATUTES OF THE UNITED STATES AND FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED IN THE CASE 4

STATEMENT OF THE CASE 5

ARGUMENT OF REASONS FOR ALLOWANCE OF THE WRIT 8

I.

The Delay Between The Offense And The Indictment And Arrest Of Defendant, And Between The Indictment And The First Trial Of Defendant, And Between The First Trial That Ended In A Mistrial And The Second Trial, The Delays Being Solely On The Part Of The Government And Without Any Fault Of The Defendant, Constitute A Deprivation Of Defendant's Constitutional Right To A Speedy Trial, And The Judgment Against Him Should Be Reverse[illegible] 8

II.

The Undue And Unnecessary Delay On The Part Of The Government To Indict And To Bring The Case To Trial, Coupled With The Fact That The Sole Evidence Against Petitioner Was The Recollection Of A Witness Of A Brief Conversation Had 44 Months Prior To The Date Of The Witness' Testimony, And The Loss Of Memory Of A Defense Witness Who Was Present At That Conversation, Rendered Defendant's Conviction Unfair And Violative Of His Right Of Due Process Guaranteed By The Fifth Amendment Of The United States Constitution, And The Court Should Exercise Its Supervisory Responsibility For Criminal Proceedings And Set Aside A Conviction So Unfairly Obtained 16

APPENDIX—Opinion of Court Below 1a-6a

List Of Authorities Cited

Cases:

Barber v. Wingo, Warden, ... F. 2d ..... (6th Circuit, 1971) 9
Dickey v. Florida, 398 U.S. 30, 26 L. Ed. 2d 26, 90 S. Ct. 1564 ..... 12, 13, 14, 15
Hanrahan v. United States, 121 U.S. App. D.C., 348 F. 2d 363 17
Klopfer v. North Carolina, 386 U.S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988 ..... 11, 16
Nickens v. United States, 323 F. 2d 808, 813, N. 3 ..... 10, 17
Ross v. United States, 349 F. 2d 210 ..... 17, 18
United States v. Dillon, 183 F. Supp. 541, 543 (1960) 13

Constitutional Provisions, Statutes and Rules:

United States Constitution, Amendment V 4
United States Constitution, Amendment VI 4, 10, 14, 15
Title 21, Section 174, United States Code 4
Title 26, Section 4705(a), United States Code 5
Title 28, Section 1254(1), United States Code 2
Rule 48(b), Federal Rules of Criminal Procedure 5, 9, 10, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

JAMES HEARD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To: *The Honorable Chief Justice And The Associate Justices Of The United States Supreme Court:*

Petitioner, James Heard, respectfully prays that the Court issue a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit affirming that he is guilty of a violation of a Federal Criminal Statute relating to narcotic drugs as he has been adjudged to be guilty by the United States District Court for the Eastern District of Michigan, Southern Division.

REFERENCE TO OPINION BELOW.

The opinion of the Court of Appeals is appended hereto. The opinion has not yet been reported. No Petition for Rehearing was filed in the court below.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked pursuant to Rule 19-1 (b) on the ground that the Court of Appeals for the Sixth Circuit has rendered a decision in conflict with the decisions of other Courts of Appeals on the same matter; has decided an important question of Federal Law which has not been, but should be settled by this court; and has decided a federal question in a way in conflict with applicable decisions of this Court, and has so far sanctioned a departure by a District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The judgment of the Court of Appeals affirming Petitioner's conviction in the District Court was made and entered on June 4, 1971.

No Petition for Rehearing was filed.

The Statutory Provision conferring jurisdiction on this Court to review the judgment in question by Writ of Certiorari is the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C. Sec. 1254 (1).[1]

---

[1] "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following method:

(1) By wirt of certiorari granted upon the Petition of any party to any civil or criminal case before or after rendition of judgment or decree." U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED.

First: Whether, where there is an unexplained delay of nearly one year between the alleged offense and the indictment (July 21, 1966 to July 11, 1967), and a further delay of nearly two years between the indictment and the Defendant's first trial thereon, which resulted in a mistrial (July 11, 1967 to March 4, 1969), and a further delay of more than one year from the date of the said mistrial and the commencement of the trial that resulted in the Defendant's conviction (March 5, 1969 to March 25, 1970), the Defendant's right to a speedy trial guaranteed him by the provisions of the Sixth Amendment of the United States Constitution has been violated, and his conviction should be reversed.

Second: Has the conviction of the Defendant been obtained in violation of his right of due process of law guaranteed him by the Fifth Amendment of the United States Constitution where, in addition to the unreasonable and oppressive delay in bringing him to trial, the sole evidence against him is that of a conversation that allegedly took place two days prior to an unlawful delivery of narcotics by another person, and the sole defense witness concerning that conversation testified that he had lost memory of it because of the passage of time and where the government's only evidence concerning that conversation consisted of the recollection of one witness who testified 44 months later.

CONSTITUTIONAL PROVISIONS AND STATUTES OF THE UNITED STATES AND FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED.

United States Constitution, Amendment VI:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, . . ."

United States Constitution, Amendment V:

"No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

Title 21, Section 174, United States Code (Title 21, U.S.C.A., Sec. 174):

"Whoever fraudulently or knowingly imports or brings any narcotic drugs into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had pos-

session of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury . . ."

Title 26, Section 4705(a), United States Code (Title 26, U.S.C.A., Sec. 4705(a)):

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Rule 48(b), Federal Rules of Criminal Procedure:

"Dismissal by the Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a Defendant who has been held to answer the District Court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

STATEMENT OF THE CASE.

Petitioner, James Heard, was jointly indicted with one Joanne Henderson for violations of Federal Narcotic Laws. The indictment consisted of five counts. Counts one and two, naming only Joanne Henderson, were dismissed, and Petitioner and Joanne Henderson were found not guilty of Count three. They were both found guilty of Counts four and five of the indictment, Count four having charged them with an unlawful sale of narcotic

drugs in violation of Section 4705 (a), Title 26, U.S.C., and Count five having charged them with unlawful possession of narcotic drugs in violation of Section 174, Title 21, United States Code, both offenses having occurred on or about July 23, 1966. Upon a trial before a jury, both Defendants were found and adjudged to be guilty as charged in Counts four and five of the Indictment, and each was sentenced to a term of imprisonment upon each of said counts for a period of five years, the sentences to run concurrently.

Petitioner, a man of 50 years at the time of trial, a resident of the City of Chicago, Illinois, and supervisor of sales and one of the owners of Out Clean Corporation, manufacturer of a liquid pipe drain was arrested in the City of Chicago sometime between July 11, and August 14, 1967 (Tr. 279-280).[1] His arrest was upon an indictment that had been returned in the District Court of the United States for the Eastern District of Michigan, Southern Division on July 11, 1967. He was released on bond, and on February 26, 1969, received his first notice to appear for trial, the trial date being March 4, 1969. On March 4, 1969, his trial began and ended in a mistrial on March 5, 1969. On February 20, 1970, he received his second notice to appear for trial, the date of trial being March 25, 1970. On March 25, 1970, he appeared for trial and before trial began, moved the Court to dismiss because of delay in bringing the case to trial (Tr. 3-22). The Court denied the Motion to dismiss,

---

[1] Although Defendant's testimony is that he was arrested sometime in the early part of September, the docket entry shows that his appearance was filed in the case and that he was arraigned on August 14, 1967.

stating that there had not been a showing of prejudice which would justify the court in dismissing the indictment (Tr. 22).

At the trial a former Federal Narcotic Agent, Carl Eugene McKinney, testified that he had met Petitioner at an airport in Detroit in the afternoon of July 21, 1966, where the Defendant was changing planes, and while he, McKinney, was in the company of co-defendant, Joanne Henderson, and an informant, named Prince Monyeau (See Tr. 52 et seq and 99). Another federal agent testified that he had observed McKinney meet with Heard, Henderson and Monyeau on the afternoon of July 21, 1966 (Tr. 212 et seq). The government's evidence against Petitioner was that at the meeting at the airport on July 21, 1966 aforesaid, Petitioner had told McKinney and Monyeau to give Miss Henderson $500.00 and that she could bring them enough narcotics back from Chicago that night that they could sell and earn $1500.00 (Tr. 55), and that after Petitioner had emplaned from the airport and at about 8:00 o'clock that evening McKinney gave Miss Henderson $500.00 (Tr. 57-58). Two days later, on July 23, 1966, Miss Henderson delivered narcotics to McKinney (Tr. 61-62).

Monyeau, the informant, testified that he could not remember what the conversation was at the meeting at the airport (Tr. 273), and Miss Henderson, (Tr. 303-304) and Petitioner (Tr. 286) denied the statements about narcotics that McKinney attributed to Petitioner during the meeting at the airport.

ARGUMENT OF REASONS FOR ALLOWANCE OF THE WRIT.

I.

THE DELAY BETWEEN THE OFFENSE AND THE INDICTMENT AND ARREST OF DEFENDANT, AND BETWEEN THE INDICTMENT AND THE FIRST TRIAL OF DEFENDANT, AND BETWEEN THE FIRST TRIAL THAT ENDED IN A MISTRIAL AND THE SECOND TRIAL, THE DELAYS BEING SOLELY ON THE PART OF THE GOVERNMENT AND WITHOUT ANY FAULT OF THE DEFENDANT, CONSTITUTE A DEPRIVATION OF DEFENDANT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL, AND THE JUDGMENT AGAINST HIM SHOULD BE REVERSED.

Although Petitioner was charged jointly with Joanne Henderson with the possession and sale of narcotic drugs on or about July 23, 1966, the evidence is that Petitioner aided and abetted Miss Henderson's possession and sale of narcotics on July 23, 1966 by his statements at a brief meeting in the airport in Detroit on July 21, 1966. Petitioner received no notice of the charges against him until he was arrested, after he had been indicted on July 11, 1967. He was arraigned on August 14, 1967, and was freed on bail pending disposition of the indictment. The case was not called to trial by the court until March 4, 1969, and a mistrial was declared on March 5, 1969 because of improper examination of government witnesses by the Government Attorney. Petitioner was not notified to appear for trial again until February 20, 1970, and that notice stated that trial would begin on March 25, 1970. The trial did in fact begin on March

25, 1970, and ended with Defendant's conviction on April 4, 1970. Prior to the second trial at which Defendant was convicted, Petitioner moved to dismiss the indictment on the ground that he had been denied a speedy trial. Though the Government Attorneys were silent on this issue, the trial court in denying the motion to dismiss the indictment, stated that he had been ill during the last part of 1969 and the first part of 1970; that the United States Attorney's office had been understaffed, and that he had given priority to the cases of Defendants who were in custody, over those cases where the Defendants were free on bail. The Court below relies upon its own decision in *Barker* v. *Wingo, Warden,* ..... F. 2d ..... (6th Cir. 1971) to affirm the trial court's denial of the motion to dismiss in the case at bar. In *Barker* the Court held that there must have been a demand by Defendant for trial or a showing made by him of substantial prejudice resulting from the undue delay before delay of trial requires the dismissal of the charge against him in a criminal case. In the case at bar the court below said:

> "In the instant case the appellant made no demand or request for trial until after the mistrial was declared on March 5, 1969. An oral motion to dismiss because of delay in bringing the case to trial was made on March 25, 1970, at the opening of the second trial."

The Court thus overlooked Rule 48 (b) of the Federal Rules of Criminal Procedure which rule provides as follows:

> "Dismissal By The Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who

> has been held to answer to the District Court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

This rule is but an implementation of the Sixth Amendment to the Constitution of the United States, which in pertinent part provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. * * *"

Rule 48 (b) of the Federal Rules of Criminal Procedure provides the relief that the court may grant upon the Government's failure to fulfill this obligation—dismiss the indictment. As was stated by Mr. Justice Wright in his concurring opinion in *Nickens* v. *United States,* 323 F. 2d 808, 813, N. 3:

> "The legislature is free to implement the constitutional right and to provide protections greater than the constitutional right. But the minimum right of the accused to a speedy trial is preserved by the command of the Sixth Amendment whatever the terms of the statute, and that minimum right is measured by a flexible standard which takes account of all the circumstances."

Rule 48 (b) prohibits "an *unnecessary delay* in presenting the charge to a grand jury," and an unnecessary delay in bringing a defendant to trial.". The question is whether the delay was necessary, a question for judicial determination with the prosecution being required to justify the delay to the court's satisfaction. This requirement avoids divestiture of the substance of Rule 48 (b), and the aforementioned constitutional guarantees; it denies to the prosecution autocratic power and confers upon the court its rightful responsibility to re-

view and pass upon the prosecution's conduct and the rights of an accused.

In *Klopfer* v. *North Carolina,* 386 U.S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988, this court reviewed a conviction upheld by the Supreme Court of North Carolina upon an accused's claim that his constitutional right to a speedy trial had been denied. In *Klopfer* the prosecutor prevailed upon the trial court to enter an order of "Nolle prosequi with leave," after a hung jury.

In condemning the denial of an accused's constitutional right to a speedy trial and in reversing the order of "Nolle Prosdqui with leave," this Court held:

> "We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), where it was written, 'we will sell to no man, we will not deny or defer to any man either justice or right; but evidence of recognition of the right to a speedy justice in even earlier times is found in the Assize of Clarendon (1166). * * * He (Sir Edward Cooke) also believed that the delay in trial by itself, would be an improper denial of justice.
>
> * * *
>
> "This history of the right to a speedy trial and its reception in this country clearly establishes that it is one of the most basic rights preserved by our constitution." (386 U.S. at 223-226.)

The Court below states that no demand for trial was made until March 5, 1969, the date of the mistrial, and the motion to dismiss was made on March 25, 1970 at

the beginning of the second trial. Thus, a total of 385 days elapsed between the time of the demand and the date of the trial. According to the docket entries, this case was never called to trial between March 5, 1969 and March 25, 1970. From the date of arraignment, August 14, 1967, to the date of the mistrial on March 5, 1969, to the date of the second trial on March 25, 1970, the defendant stood ready for trial. He appeared and proceeded to trial on both occasions that the case was called to trial. He sought no delay.

Any suggestion that Defendant's silence from the date of his arraignment to the date of the mistrial, insofar as a demand for trial is concerned, somehow permits deprivation of his right to a speedy trial or constitutes a waiver thereof, is amply answered in the concurring opinion of Mr. Justice Brennan, joined in by Mr. Justice Marshall, in *Dickey* v. *Florida*, 398 U.S. 30, 26 L. Ed. 2d 26, 90 S. Ct. 1564:

> "The view that an accused loses his right to a speedy trial by silence or inaction is open to question on at least three grounds. First, it rests on what may be an unrealistic understanding of the effect of the delay.
>
> • • •
>
> Second, the equation of silence or inaction with waiver is a fiction that has been categorically rejected by this Court when other fundamental rights are at stake. Over 30 years ago in *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 146 ALR 357 (1938), we defined 'waiver' as 'an intentional relinquishment or abandonment of a known right or privilege.' We have made clear that courts should 'indulge every reasonable presumption against waiver,' *Aetna Ins. Co.* v. *Kennedy*, 301 U.S.

389, 393, 81 L. Ed. 1177, 1180, 57 S. Ct. 809 (1937), and they should 'not presume acquiescence in the loss of fundamental rights.' *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n,* 301 U.S. 292, 307, 81 L. Ed. 1093, 1103, 57 S. Ct. 724 (1937). In *Klopfer,* supra, at 233, 18 L. Ed. 2d at 8, we held that the right to a speedy trial 'is as fundamental as any of the rights secured by the Sixth Amendment.' It is a safeguard of the interests of both the accused and the community as a whole. Thus, can it be that affirmative action by an accused is required to preserve—rather than to waive—the right?

Third, it is possible that the implication of waiver from silence or inaction misallocates the burden of ensuring a speedy trial. The accused has no duty to bring on his trial. He is presumed innocent until proven guilty; arguably, he should be presumed to wish to exercise his right to be tried quickly, unless he affirmatively accepts delay. The government, on the other hand, would seem to have a responsibility to get on with the prosecution, both out of fairness to the accused and to protect the community interests in a speedy trial. Judge Weinfeld of the District Court for the Southern District of New York has observed, 'I do not conceive it to be the duty of a defendant to press that he be prosecuted upon an indictment under penalty of waiving his right to a speedy trial if he fails to do so. It is the duty of the public prosecutor, not only to prosecute those charged with crime, but also to observe the constitutional mandate guaranteeing a speedy trial. If a prosecutor fails to do so, the defendant cannot be held to have waived his constitutional right to a speedy trial.' *United States* v. *Dillon,* 183 F. Supp. 541, 543 (1960)."

It is respectfully suggested that a delay of approximately 352 days between the date of the alleged offense and the date of the indictment, a delay of approximately 33 days between the indictment and the arraignment, and a further delay of approximately 566 days between the arraignment and the first trial, which ended in a mistrial, and a further delay of approximately 375 days between the mistrial and the second trial, after a demand for was made,—a total delay of approximately 1,326 days—commanded that the trial court dismiss the indictment under the provisions of Rule 48 (b) of the Federal Rules of Criminal Procedure, and the delay and the refusal to dismiss the indictment on the defendant's motion constitutes a violation of Petitioner's Sixth Amendment constitutional right to a speedy trial.

It has been pointed out by members of this Court that issues raised in this case about the speedy trial guarantee of the constitution have not been dispositively decided by this Court. In the concurring opinion of Mr. Justice Brennan in *Dickey* v. *Florida,* in which opinion Mr. Justice Marshall joined, (398 U.S. 30, 26 L. Ed. 2d 26, 90 S. Ct. 1564) the following language appears:

> "I do not read the Court's opinion as deciding that in post-*Klopfer* cases (1) the defendant can challenge only delay occurring after his arrest; (2) he is not entitled to a speedy trial unless he demands it at the time of the delay; (3) he must prove actual prejudice, or (4) the delay must be deliberately caused by the government. It is timely to note that the Court has as yet given scant attention to these and other questions essential to the definition of the speedy-trial guarantee. Before *Klopfer,* only three of our opinions dealt at any length with the right,

and each was decided with little analysis of its scope and content. See *Beavers* v. *Haubert,* 198 U.S. 77, 49 L. Ed. 950, 25 S. Ct. 573 (1905); *Pollard* v. *United States,* 352 U.S. 354, 1 L. Ed. 2d 393, 77 S. Ct. 481 (1957); *United States* v. *Ewell,* 383 U.S. 116, 15 L. Ed. 2d 627, 85 S. Ct. 773 (1966). *Klopfer* itself attempted no extensive analysis; nor did our later decision, *Smith* v. *Hooey,* 393 U.S. 374, 21 L. Ed. 2d 607, 89 S. Ct. 575 (1969). And today we do not consider the effect of the application of the Speedy Trial Clause to the States. Thus, although we said in *Klopfer* that the right to a speedy trial is 'one of the most basic rights preserved by our Constitution,' 386 U.S., at 226, 18 L. Ed. 2d at 9, a guarantee 'as fundamental as any of the rights secured by the Sixth Amendment,' id., at 223, 18 L. Ed. 2d at 8, we have yet even to trace its contours. Accordingly, I think it appropriate to point out certain of the major problems that courts must consider in defining the speedy-trial guarantee."

The case here presents so clear and far a departure from accepted and usual procedures relating to time of arrest indictment and trial that the Court should grant certiorari and "trace the contours" of the fundamental right to a speedy trial guaranteed by the Sixth Amendment.

II.

THE UNDUE AND UNNECESSARY DELAY ON THE PART OF THE GOVERNMENT TO INDICT AND TO BRING THE CASE TO TRIAL, COUPLED WITH THE FACT THAT THE SOLE EVIDENCE AGAINST PETITIONER WAS THE RECOLLECTION OF A WITNESS OF A BRIEF CONVERSATION HAD 44 MONTHS PRIOR TO THE DATE OF THE WITNESS' TESTIMONY, AND THE LOSS OF MEMORY OF A DEFENSE WITNESS WHO WAS PRESENT AT THAT CONVERSATION, RENDERED DEFENDANT'S CONVICTION UNFAIR AND VIOLATIVE OF HIS RIGHT OF DUE PROCESS GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND THE COURT SHOULD EXERCISE ITS SUPERVISORY RESPONSIBILITY FOR CRIMINAL PROCEEDINGS AND SET ASIDE A CONVICTION SO UNFAIRLY OBTAINED.

The delays that occurred between the alleged offense in this case, and the date of the commencement of Defendant's trial were unnecessary, unreasonable and without the fault of the Petitioner. Only twice was he notified that his case was to be called to trial, and on both occasions he appeared, answered ready to proceed, and did proceed to trial. During all of this time he was under the cloud of a criminal prosecution and was compelled to undergo a long period of anxiety. In *Klopfer* v. *North Carolina,* 386 U.S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988, in a separate opinion, concurring in the result, Mr. Justice Harlan said that,

> "The procedure of a state that allowed state prosecuting officials to put a person under a cloud of an unliquidated criminal charge for an indeterminate period violates the requirement of fundamental fairness assured by the due process clause to the Fourteenth Amendment."

So too does the opinion of the Court below, that allows the Government to put a person under the cloud of an unliquidated criminal charge for an indeterminate period violate that person's right of due process of law guaranteed by the Fifth Amendment of the United States Constitution.

In *Nickens* v. *United States,* 116 U.S. App. D.C. 338, 323 F. 2d 808, the Court said:

> "Although it has not been directly decided, due process may be denied when a formal charge is delayed for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused."

Also in *Hanrahan* v. *United States,* 121 U.S. App. D.C., 348 F. 2d 363, the Court said:

> "In some cases, the length of that delay may be so great that prejudice can be presumed unless the government can show otherwise."

When to the oppressive delay in this case is added the fact that the only person present at the time of the alleged conversation which is the sole basis of the conviction of the Petitioner was unable to give testimony on behalf of the Defendant because he could not remember the conversation had so long ago, and the fact that the only witness who gave incriminating testimony against him testified from memory about a conversation had 44 months prior to the date of his testimony, then the unnecessary delay achieves more critical proportion. Although the case here may be distinguished on its facts from the case of *Ross* v. *United States,* 349 F. 2d 210, the distinction is without a real difference. The principle of *Ross* is applicable here. In *Ross* the Court said that

the record before it showed (1) a purposeful delay of seven months between the offense and arrest, (2) a plausible claim of inability to recall or reconstruct the events of the day of the offense, and (3) a trial in which the case against the appellant consisted of the recollection of one witness refreshed by a notebook. The Court said:

> "We are not convinced that successful police operations against narcotics in this jurisdiction depend upon proceedings of such slender dimensions. The government's case should, at the least, have more substance than the one before us if it is to override appellant's interest in earlier notification. Without attempting to define the precise reach of the Fifth Amendment in this context, a due regard for our supervisory responsibility for criminal proceedings in this jurisdiction requires in our view, the reversal of this conviction."

The record in the case at bar shows a delay between offense and indictment and arrest of nearly twelve months and thereafter critical lengthy periods of delay between indictment and arrest and petitioner's trial. It supports a plausible claim of damage to the defense occasioned by the delay and the evidence against the Petitioner is slight and untrustworthy. The proceedings against Petitioner were truly of "slender dimensions."

Respectfully submitted,

HOWARD T. SAVAGE
Suite 1015
100 N. LaSalle Street
Chicago, Illinois 60602
Telephone: (312) STate 2-2131
Attorney for Petitioner

APPENDIX

OPINION BELOW

Nos. 20723-20724

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES HEARD,
Defendant-Appellant,

JOANNE HENDERSON,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed June 4, 1971.

Before: *Miller* and *Kent*, Circuit Judges, *McAlister*, Senior Circuit Judge.

Kent, Circuit Judge. Appellants appeal from their convictions, by jury verdict, for violations of the laws relating to narcotics. Originally, the indictment, under which the appellants were tried, included five counts. The first two counts, which were directed at appellant Henderson alone, were dismissed on motion of the Government. The jury acquitted the appellants on Count 3, which charged them with unlawful purchase of heroin. Under Count 4 of the in-

dictment the appellants were convicted of the unlawful sale of heroin, in violation of 26 U.S.C. § 4705(a), and under Count 5 of the indictment they were convicted of the unlawful possession of heroin, in violation of U.S.C. § 174.

On this appeal the appellants complain that each was denied the Constitutional Right to a speedy trial, and they complain that there was a fatal variance between the indictment and the proofs because of a difference in dates.

Appellant Heard complains that the indictment charged violations which were alleged to have occurred "on or about July 23, 1966," and that all the proofs referred to actions on his part which were alleged to have occurred on July 21, 1966. He claims he had alibi witnesses who would have established that on July 23, 1966, he was not in Detroit where the offenses are alleged to have occurred. The evidence shows that the specific acts constituting the alleged offenses were supposed to have been committed between July 20 and July 23, 1966.

On November 16, 1966, appellant Henderson was arrested, on a warrant and, after arraignment, she was released on her personal recognizance. On July 11, 1967, an indictment was returned by the Grand Jury. On August 14, 1967, appellant Heard was arraigned on the indictment and released on bail previously furnished in Chicago. On October 16, 1967, appellant Henderson was arraigned on the indictment and released on her personal recognizance. On December 5, 1968, the trial judge scheduled a pretrial conference for January 20, 1969. On February 4, 1969, notice was given that the case would be brought on for trial commencing on February 25, 1969. On February 26, 1969, the case was scheduled for trial commencing on March 4, 1969. On March 4, 1969, the case came on for trial, and on March 5, 1969, a

mistrial was declared on motion of appellant's counsel. On March 25, 1970, the case was again brought on for trial and for the first time the appellants made a motion presenting to the Court the claim that their Constitutional Rights had been denied by the failure to grant them a "speedy trial." The motion to dismiss was denied, the case proceeded to trial and resulted in the convictions from which these appeals are taken.

The law in regard to speedy trial has been recently reviewed by this Court in an opinion by Judge Wade H. McCree, Jr. in a case entitled *Barker* v. *Wingo, Warden*, — F. 2d —, (6th Cir. 1971). In *Barker* this Court concluded that under the weight of Federal authority there must be a demand for trial or a showing of substantial prejudice, resulting from the claimed undue delay, before delay of trial requires the dismissal of charges against a defendant in a criminal case. In the instant case the appellants made no demand or request for trial until after the mistrial was declared on March 5, 1969. An oral motion to dismiss because of delay in bringing the case to trial was made on March 25, 1970, at the opening of the second trial. In disposing of the motion the late District Judge Theodore Levin pointed out that the United States Atorney's Office, which was involved, had been extremely short of staff, beginning in the Summer of 1969; that the Judges of the District Court were greatly disturbed because there were persons charged with crime who were confined in jail as a result of inability to make bond. Judge Levin pointed out that the Court was of the opinion that those defendants in criminal cases confined to jail had to be tried before cases involving defendants on bail could be brought to trial. In addition, Judge Levin informed counsel and the parties that he had

been seriously ill during the late part of 1969 and the early part of 1970. Judge Levin stated that despite the illness he did try some cases involving persons charged with crime who were confined to jail.

Under the circumstances of this case, wherein there was a lack of a demand, and where the delay from the first trial to the second trial was explained on the record, we hold that such delay was not an abuse of the Constitutional Rights of these appellants, absent a showing of substantial prejudice.

The only claim of actual prejudice in this case is that claimed by appellant Heard, which involves one of the same issues as the claimed variance between the indictment and the proofs.

There are two issues raised as to the alleged variance; the first being the claim that appellant Heard was charged as a principal, whereas the Government claimed and offered evidence to demonstrate no more than that appellant Heard aided and abetted the appellant Henderson in the possession and sale of the narcotics. This issue has been previously before this Court in a different connotation in *United States* v. *Lester*, 363 F. 2d 68 (6th Cir. 1966), wherein the Court said at page 72:

> "In keeping with the provisions of Section 2,[1] it has long been held that an indictment need not specifically charge 'aiding and abetting' or 'causing' the commission of an offense against the United States in order to support a joint verdict based upon a finding of either. All indictments must be read in effect, then, as if the alternatives provided by 18 U.S.C. § 2 were embodied in each count thereof. [citations omitted]."

---

[1] 18 U.S.C. § 2.

Under this decision there was no variance between the indictment and the proofs as to the Government's claim that appellant Heard "aided and abetted" in the commission of the crimes charged in the indictment.

Appellant Heard also claims there was a variance between the indictment and the proofs because the indictment alleged an offense occurring "on or about July 23, 1966," whereas, the Government claimed and offered evidence to show that any actual physical participation by appellant Heard occurred on July 21, 1966. The answer to this issue also disposes of the claim by appellant Heard that he was prejudiced by the variance in date because of inability to produce alibi witnesses. The problem of such variance is readily resolved by examination of the transcript of the proceedings at the opening of the first trial in March, 1969. In his opening statement, on March 3, 1969, counsel for the Government pointed out that the indictment charged that the offense had been committed "on or about" the specific date and warned the jury that the proofs would not be confined to the date charged in the indictment. Speaking of Counts 3, 4, and 5, conusel for the Government stated: "* * * and we will establish that a meeting took place on July 21, 1966, a meeting, the purpose of which was to affect a transaction in illicit narcotics on the part of both of the defendants." Obviously, the appellant Heard knew a year before the trial, which resulted in his conviction, that he would have to provide a defense in regard to matters which occurred on July 21, 1966.

The meaning of the language "on or about" in an indictment has been the subject of judicial review on surprisingly few occasions. The Court of Appeals for the 9th Circuit in

discussing this issue said in *Yaw* v. *United States*, 228 F. 2d 382, (9th Cir. 1955), at page 383:

> "The phrase 'on or about' a date stated in the indictment as fixing the time of the crime, is held by the Second Circuit to be within a few weeks of the 'on or about' date. *United States* v. *Tramaglino*, 2 Cir., 197 F. 2d 928, certiorari denied 1952, 344 U.S. 864, 73 S. Ct. 105, 97 L. Ed. 670. In the Third Circuit proof of a felonious sale of liquor on March 4th or 5th was held sufficient on an indictment charging it to have occurred 'on or about the 11th day of March, 1921'. *Thompson* v. *United States*, 3 Cir., 1922, 283 F. 895, 896. The Supreme Court, in *Ledbetter* v. *United States*, 170 U.S. 606, at page 612, 18 S. Ct. 774, at page 776, 42 L. Ed. 1162, stated:
>
> > 'Neither is it necessary to prove that the offense was committed upon the day alleged, unless a particular day be made material by the statute creating the offense. Ordinarily, proof of any date before the finding of the indictment, and within the statute of limitations, will be sufficient.'"

As pointed out previously, the appellants obviously knew throughout the trial, which resulted in their convictions, of the fact that July 21, 1966 was a date as pertinent to the charges as the date July 23, 1966 contained in the indictment.

We are satisfied that there was no fatal variance in the indictment; there was no fatal variance in the proofs and the appellants were not prejudiced by any variance in the proofs of which they had knowledge at least one year in advance. The other allegations of error do not require discussion.

Judgment affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-21

JAMES HEARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1971. The petition for a writ of certiorari was filed on July 3, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

ISSUE PRESENTED

Whether the indictment against petitioner should have been dismissed on the basis of pre-indictment and post-indictment delay that was not purposeful,

440-421—71

oppressive, or actually prejudicial to his defense, and notwithstanding the absence of a timely demand to be tried.

STATEMENT

On retrial[1] before a jury in the United States District Court for the Eastern District of Michigan, petitioner and Joanne Henderson were convicted of possession and sale of heroin, in violation of 26 U.S.C. 4705(a) and 21 U.S.C. 174. On April 2, 1970, each was sentenced to imprisonment for concurrent terms of five years. The court of appeals affirmed (Pet. App. 1a–6a).

The evidence showed that on the afternoon of July 21, 1966, narcotics undercover agent Carl McKinney met with petitioner, Miss Henderson, and one Prince Monyeau at the Metropolitan Airport in Detroit, Michigan, while petitioner waited for a connecting flight to New York. At a restaurant in the airport terminal, petitioner mentioned to McKinney that he would be traveling to Brownsville, Texas, on August 4th with $5,000 to obtain heroin. He invited McKinney and Monyeau to join him if they had $1,500 (Tr. 55, 155).[2] McKinney replied that he did not have that much money. Petitioner then said that Miss Henderson was flying to Chicago that evening, and that if McKinney would furnish her with $500,

[1] Petitioner's first trial ended in a mistrial ordered by the district court because evidence had been introduced which was inadmissible under the Seventh Circuit's opinion in *United States* v. *White*, 405 F. 2d 838, which was later reversed by this Court (401 U.S. 745).

[2] The transcript of trial has been filed with the Clerk of the Court.

she would obtain enough heroin for him to dilute and resell for $1,500. McKinney agreed to obtain the $500; he was directed to deliver it to Miss Henderson prior to 8 p.m. (Tr. 55, 156–157). That evening McKinney gave Miss Henderson the agreed amount (Tr. 58, 165–166).

On July 23, 1966, McKinney met with Monyeau and Miss Henderson in the bar of the hotel in which she resided. She gave McKinney a tin foil package wrapped in a handkerchief. The package contained 17.44 grams of heroin (Tr. 32, 61, 169).

ARGUMENT

1. The sole issue raised by petitioner involves claims of undue delay between the date the offense was committed (July 23, 1966) and indictment (July 11, 1967), between indictment and the first trial (March 4, 1969), which resulted in a mistrial, and between the first trial and the retrial which ended in conviction (March 25–April 2, 1970). The courts below correctly determined that petitioner was not entitled to relief because he had failed to show that he was in any way prejudiced by these delays.[3] Indeed, the only allegation resembling an attempt to establish prejudice concerns the inability of the defense at the second trial to locate two witnesses who would have testified concerning petitioner's whereabouts on July 23, 1966, when the transfer of heroin from Miss Henderson to

[3] The court of appeals also noted that petitioner had never made a demand for trial and did not assert a claim of undue delay until his second trial (Pet. App. 3a).

Agent McKinney occurred. The goverment, however, never contended that petitioner was present at the time of the transfer; the alibi witnesses would have furnished nothing to disprove the testimony that petitioner conversed with McKinney at the Detroit airport on July 21, 1966, and at that time initiated the conversation which resulted in the unlawful transaction.[4] Unlike the case relied upon by petitioner (*Ross* v. *United States*, 349 F. 2d 210 (C.A. D.C.)), we are not here dealing with a defendant who had difficulty remembering events even in the recent past, or with an agent who had any doubt that petitioner was the individual he had met at the Detroit airport.[5]

Nor is there any other basis on which relief should be granted. The one year pre-indictment delay was attributable, at least in part, to the need for a comprehensive investigation into the narcotics scheme of which petitioner's activities were suspected to be a part. The 20-month delay between the return of the indictment and the first trial was in part taken up by pre-trial conferences. And the further delay of more than one year between the first and second trials

---

[4] Indeed, petitioner at trial admitted that he flew to Detroit on July 21, and met with Miss Henderson; however, he denied that McKinney was present, or that he had ever spoken with the agent (Tr. 282–286).

[5] We note, too, that the decision in *Ross* was premised upon the court of appeals' supervisory powers, and dealt with a particular type of narcotics investigation routinely conducted by the District of Columbia Metropolitan Police. Subsequent cases have confirmed that *Ross* is strictly limited to the circumstances there presented. *E.g.*, *Daniels* v. *United States*, 357 F. 2d 587 (C.A. D.C.); *Bey* v. *United States*, 350 F. 2d 467 (C.A. D.C.).

was occasioned by a shortage of personnel in the United States Attorney's office and a decision to give priority to the trials of incarcerated defendants as well as a serious illness suffered by the trial judge. In sum, there is little to support any claim that unjustified delay occurred between the steps of the criminal proceeding against petitioner. Certainly, no oppressive or vexatious conduct can be attributed to the government. *United States* v. *Ewell,* 383 U.S. 116; *Pollard* v. *United States,* 352 U.S. 354.

2. Issues involving the relationship between preindictment delay and speedy trial or due process claims are presently before the Court in *United States* v. *Marion,* No. 70–19, further consideration of question of jurisdiction postponed to hearing of case on the merits, 401 U.S. 934. This case, however, need not be deferred pending the outcome in *Marion.* The one year that passed between the offense and indictment here was far less than the period of the statute of limitations, and petitioner has made no showing of prejudice. See our brief in opposition in *Kroll and Cahn* v. *United States,* Nos. 1314 and 1435, October Term, 1970, certiorari denied, May 3, 1971.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

AUGUST 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971